The Privacy Report

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FREE SPEECH AND THE ZONE OF PRIVACY

By Robert E. Smith

As Oren Taylor watched TV in his home in Boise, Idaho, lying naked (as was his custom), there was a knock on the door. Police ordered him out on his porch, refused his pleas to let him get dressed, and arrested him on a firearms charge. Out of a ditch in front of the home came a local TV news man, with lights on and camera rolling. KTVB showed the naked Mr. Taylor on its news show the following day to 17,000 households in Idaho and eastern Oregon. Taylor's lawsuit against the station will go to trial this fall (Taylor v. KTVB, Inc., Civil No. 11345, Idaho Dist. Ct., Ada Co.).

The case symbolizes the frequent confrontation between the individual's right to privacy and others' First Amendment rights of free speech and free press. The conflict is not a new one; in fact the Warren-Brandeis law review article in 1890 that first articulated a legal right to privacy stemmed from press coverage of one of Mrs. Warren's parties that she considered an invasion of her privacy.

The privacy-First Amendment confrontation is manifest in new ways in the computer age, as government seeks to regulate private data collection that the data collectors sometimes regard as an expression of their free speech rights; as communities respond to privacy concerns by limiting commercial solicitation; as newspersons seek access to government files on individuals; and as news media themselves employ computer techniques in news gathering.

The Retail Credit Co., which maintains subjective data on some 50 million American citizens, has argued in a court challenge to its activities that its databanks are no more than an exercise of free speech and that state regulation of its databanks violates the First Amendment. The Supreme Court has often held that "purely commercial" speech, like libelous statements, obscenity and "fighting words," is not entitled to the full First Amendment protections of other speech. Calling computerized data collection "speech" may itself require a long stretch of the imagination. Still, the argument is made, and civil libertarians seeking to limit the types of information that consumer reporting firms or insurance companies may collect on individuals find themselves in the uncomfortable position of being censors.

In recent weeks, those drafting privacy legislation have partially exempted private data collection from the coverage of their bills, partly out of fear of censoring private fact-gathering. The latest draft of the Koch-

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IN THE COURTS

A mail cover placed on a New Jersey high school girl who wrote to the Socialist Workers Party as part of a class assignment was not an invasion of privacy, according to U.S. District Judge James A. Coolahan. The judge denied Lori Paton's motion for an injunction barring such FBI mail surveillance, as he earlier denied her motion for relief in behalf of a class of citizens similarly affected. The judge, however, ordered that an FBI file on Miss Paton be destroyed and, in a footnote, implied there was less cause for the police to maintain investigative files than arrest records (Paton v. LaPrade, No. 1091-73, D.N.J. Aug. 29, 1974).* * * In an amicus curiae brief, the ACLU Foundation has urged the Tenth Circuit Court of Appeals to allow Paul W. Polin's challenge to Dun & Bradstreet's credit reporting procedures to be heard on its merits, because credit reporting about an individual is often misleading, inaccurate, and indiscriminately disseminated (Polin v. Dun & Bradstreet, Inc., No. 74-1375).* * * A Fairfax County Circuit judge has dismissed an ACLU of Virginia suit against Virginia's law that citizens must provide a Social Security number for voter registration. The ACLU will now try federal court. * * * The U.S. Court of Appeals in the District of Columbia has ruled that a Washington man could be discharged by the Peace Corps when he refused to allow his employer access to his psychiatric records and to meet, without his attorney, with a government psychiatrist. Government investigators were concerned about admissions made during an interrogation concerning the employee's sex life (Anonymous v. Kissinger, No. 73-1141, July 5, 1974).

Generally, confessions that result from economic coercion are inadmissible against a defendant. But the Second Circuit Court of Appeals refused to allow this principle to protect an apprentice truck driver required to take a polygraph test administered by his employer at the request of and in the presence of the police. During the test, the man admitted a killing. His employer's threat not to hire him was hardly "substantial economic sanction" against a truck driver, said the court (Sanney v. Montanye, 43 U.S.L.W. 2028, June 20, 1974).* * * A divided Massachusetts Supreme Judicial Court, saying that lie detector evidence remains generally inadmissible, allowed polygraph evidence admitted in a case in which the defendant had agreed in advance to its use (Commonwealth v. A Juvenile (No. 1), 43 U.S.L.W. 2018, June 12, 1974).

Human Experimentation -- The U.S. Department of Health, Education, and Welfare has published proposed regulations to protect fetuses, abortuses and pregnant women, prisoners and the mentally disabled who are subjects of research involving risk (39 Fed. Reg. 30649, Aug. 23, 1974). Comments are due Nov. 21. The rules, supplementing previous regulations intended to protect all subjects generally (45 CFR 46.1), would require consent by the subject or responsible representative. Research programs would have to establish consent committees to qualify for federal assistance. Regulations affecting children as research subjects are now being drafted.

QUOTABLE

"Gossip is no longer the resource of the idle and of the vicious, but has become a trade, which is pursued with industry as well as effrontery."

Samuel D. Warren, Louis D. Brandeis, The Right to Privacy, 4 Harv. L. Rev. 5 (1890).

TAX RETURNS: NO SECRET

The Ford Administration, like its predecessor, is resisting legislation that would limit White House access to personal income tax returns. The Internal Revenue Service similarly is trying to get its own house in order, to head off legislative restrictions of its operations.

Article II of the impeachment resolution voted by the House Judiciary Committee says of Richard Nixon: *He has, acting personally and through his subordinates and agents, endeavored to obtain from the Internal Revenue Service, in violation of the constitutional rights of citizens, confidential information contained in income tax returns for purposes not authorized by law, and to cause . . . income tax audits or other income tax investigations to be initiated or conducted in a discriminatory manner.*

Sen. Lowell P. Weicker, R.-Conn., and Rep. Jerry L. Litton, D.-Mo., have introduced S. 3982 and H.R. 16602 to permit only the President personally to send for a tax return, naming the taxpayer, and then only with written justification to Congress. The Treasury Department is insisting that a Presidential executive order is adequate to curb the abuse cited in Article II. Meanwhile, IRS has circulated internal guidelines that require such White House requests to be in writing and channelled through the commissioner. The IRS guidelines also say it will respond to tax checks on prospective Presidential appointees with only notification as to whether a criminal tax investigation is pending.

Weicker and Litton are still trying to convince the House to go along with a Senate-passed amendment to the White House staff authorization bill that would accomplish the same purpose as S. 3982 and H.R. 16602.

The Weicker-Litton bill would also limit access to IRS returns to federal agencies with tax enforcement responsibilities. The Ford Administration this month proposed a weaker version that would allow four agencies, including Census and the Social Security Administration, to see personal tax returns, even for non-tax purposes. Among those resisting the tighter access provisions is Henry E. Petersen, who heads the criminal division at the Department of Justice. The Administration bill, unlike the Weicker-Litton measure, would not limit Congressional access to Form 1040.

IRS no longer informs the White House of so-called sensitive cases handled by district offices and henceforth will evaluate tips from informers about others' alleged tax violations at its national computer center, not at each district office, according to Commissioner Donald C. Alexander. And the service will design its new computer system to assure limited access to tax data, the commissioner promises. Alexander still thinks that taxpayer audits ought to be selected on the basis of machine screening and subjective decisions of IRS staff, and not subject to high-level centralized approval nor totally based on machine.

"The present tax code says that tax returns are public, with certain exceptions," noted Alexander, "when, in fact, it ought to say the opposite, that tax returns are confidential, with certain exceptions." On that, the Administration and Congressional critics agree.

Computer Dragnet -- When David E. Drew was stopped on a traffic violation in Quincy, Ill., last February, the police routinely ran his name through the FBI's computerized criminal history file of 420,000 individuals arrested for "serious" federal or state offenses. The FBI computer reported that Drew was wanted by the Marines as a deserter. He was jailed without bond, and the Marines requested, by letter, that he be detained. Drew, however, was released a few days later on a writ of habeas corpus. Drew explained to his attorney that in 1970 the Marine Reserves temporarily lost touch with him when as a reservist he changed addresses. Subsequently, he was rejected by the Selective Service System on the basis of a physical exam. Drew's reserve unit in El Paso said it had no record of Drew as being wanted; the Marine Corps Regional Office in St. Louis said all it knew about Drew was the FBI computer entry. Police in Quincy were aware of the bureaucratic mix-up and assured Drew he would no longer be arrested. But Drew did not feel safe about traveling outside of his hometown. On July 1, a military policeman arrested Drew, took him away from his family to detention at Camp Pendleton in Southern California. There he sat, until his records could be located. By this month, the Marines had agreed to discharge Drew. He has returned to Illinois and the FBI computer entry on him has been erased, after a seven-month ordeal.

No More "Fiche" -- The French government will no longer require hotels to turn over to the police daily forms with the name, address, profession, sex, identity number and signature of each new guest. As everyone suspected, the police have no time to read the more than one million "fiches" that pile up each month. The reforms do not yet apply to foreign travelers.

Drug, Alcohol Abuse -- Two federal agencies have proposed identical regulations on confidentiality of patient records in federally assisted drug and alcohol treatment programs. Hearings on the proposals will be held in October in 11 cities (39 Fed. Reg. 30426, Aug. 22, 1974). The regs allow disclosure of patient information with consent for various purposes and without consent for research, audits and evaluation. Patients would not have to disclose treatment information to prospective employers unless their addiction within the past three years caused unsatisfactory work performance. Deadline for comments is Nov. 4. * * * Earlier, the Drug Enforcement Administration of the Department of Justice proposed amendments to its recordkeeping requirements for narcotic treatment programs (39 Fed. Reg. 26424, July 19, 1974).

Privacy Push -- The Church of Scientology has adopted privacy as one of its major social campaigns. A worldwide sect, the church has exposed the international aspects of data collection (notably a report on Nazi influences in Interpol, the private affiliation of police officers). As a victim of Internal Revenue scrutiny, the church has also focused on IRS invasions of privacy and IRS refusals to make public its policies and procedures. The privacy effort is led by its National Commission on Law Enforcement and Social Justice, 5930 Franklin Ave., Los Angeles, Calif. 90028. * * * The National Council of Jewish Women plans to devote many of its local activities this fall to the privacy issue.

Subscribers are asked to send $15 ($5 for students) to defray the costs of publishing The Privacy Report. Contributions to the Privacy Project are tax-deductible and help the project to increase its monitoring of government and private data collection about individuals and to inform citizens of their rights to privacy.

A young woman wrote the following letter August 17 to Reuben Askew, Governor of Florida. The lawyer for the bank at which she sought employment wrote that her "apprehension over the polygraph examination of applicants is certainly misplaced" because it is "only one item in a battery of tests, interviews, and examinations which the banks apply in a uniform and indiscriminate manner to all applicants."

Dear Sir:

Upon applying for a job at Sun Bank of Pine Hills in Orlando, Florida, I was told that I would have to submit to a lie detector test. Refusal to submit will mean that you are not permitted employment at said organization! As a newcomer to the Orlando area, I was in need of a job. Therefore, much against all my beliefs in the American system, I took the lie detector test feeling very much like a criminal. One must realize growing up in America, the first time one sees a lie detector test is normally on a detective show on television, where the gangster, who is normally lying, is screaming -- "I'll take a lie detector test." Therefore, you compare yourself in your own mind to that gangster on the Late, Late Show!

At 11:00 on a Thursday morning, you go in to the Hallmark Corp. for a lie detector. The man there then says he's going to try to put you at ease as he then commences to ask you a lot of questions such as do you have any hidden motives for applying for this job, have you ever drunk to excess, have you ever smoked marijuana, or taken any other drugs not given to you by a doctor? Have you ever stolen any merchandise or money over $5? Have you ever been arrested? Have you ever used any other name? Have you ever been dismissed from a company where you previously worked? Did you have to leave Washington because of delinquent bills or any other such reason? The questions go on through two pages -- these questions are asked orally, however!

Then, now that you are supposed to be relaxed, he tells you to turn the chair around, this is so you are not facing the machine, he puts something around your arm as if a doctor was taking your blood pressure, a chain around your waist, and two small bands around two fingers of your right arm. Your arm is then placed on two sponges and you are told to close your eyes and keep them closed! This alone is scary!

Then he continues to ask you about ten questions pausing 15 seconds after every question. Of course, unless you are stupid or completely in some kind of euphoria the question that you await is Have you ever stolen anything? Whether you have or have not this makes you feel as if you have. Therefore, although, you are broke, you go home feeling like a thief!!

Massachusetts law prohibits an employer from requiring lie detector tests of his applicants or employees, and so a Boston book store owner decided he would use psychological stress evaluators. Unlike the polygraph the PSE measures only one indicator of stress -- voice modulation. A supervisor figured that the PSE sounded like a lie detector to him and refused to administer the tests. He was promptly fired. Now he is trying to get the Massachusetts Attorney General to take action against the book store.

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Goldwater/Ervin broad-based bill would authorize a new Federal Privacy Commission to study private databanks not regulated by the bill (presumably using the commission's subpoena powers) and to recommend legislation.

The First Amendment issue is sure to arise if the commission seeks to study databanks now maintained by many news organizations. The most notable example is the "morgue" of The New York Times, now the on-line New York Times Information Bank, which indexes and abstracts data from every New York Times and from about 60 other publications. The personal information stored in the IBM 370/145 and available by display terminals to distant reporters -- or commercial subscribers -- has all been published previously, but under some circumstances it still may be regarded by an individual as private, especially after the passage of time. Such a computer system now means, in fact, that an individual who felt his privacy was invaded by a news item is no longer protected by the passage of time.

The New York Times plans eventually to computerize 100,000 Times articles. It markets the service vigorously to outsiders for $675 - $1350 a month plus installation charges. A remote terminal has already been installed at the University of Pittsburgh library and nearly two dozen other government agencies, businesses and news organizations. What an employer or investigator may no longer be able to get from the Federal Bureau of Investigation or the Internal Revenue Service he may be able to get easily through the New York Times, or some other private service. A person may then have a better chance for a job or insurance if he has never had his name in the papers.

The computerized morgue is only one way that news media now use modern data processing. "At large and small newspapers all over the country, political reporters are doing sophisticated samplings of voter opinions," according to a Times article September 1. "Crime reporters are sifting criminal justice records with computers. Others have rummaged through census data and analyzed traffic accident patterns, the background of rioters, political campaign contribution lists and countless other kinds of data."

Aware of this, representatives of newspaper publisher and editor associations have opposed legislation that restricts access to computerized criminal records maintained by local and federal agencies. They say this limits their First Amendment rights to know and report the news and to monitor the conduct of the police. In fact, the current proposals would prohibit outside access when the system is queried by name of an individual. When the system is queried as to an arrest as an event, access would be available, much as police "blotter" information is now open to press and public. News representatives recognize the abuses of arrest records, but argue that the remedy is to prohibit the use of an arrest record to deny employment, housing or other benefit not to close off government arrest records to outside scrutiny.

Further, they argue, the remedy for abuses of personal privacy is not to prohibit publication of presumably private facts. A case in point is Roe v. Doe, which the U.S. Supreme Court has agreed to hear this year (No. 73-1446). In that case, a psychoanalyst team wrote a book that included the edited notes of their sessions with a woman and her late husband, together with a so-called diary of their child. The authors claim to have concealed the identity of the patients; the patients claimed an implied contract of doctor-patient confidentiality had been breached. The Appellate Division in New York, despite the strong precedents against prior restraint of the press, issued an injunction barring distribution of the book pending the outcome

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of a suit, "in light of the expanding recognition of invasion of privacy actions, and in view of the confidentiality accorded the physician-patient relationship" (42 A.D. 2d 559, 352 N.Y.S. 2d 626).

The Supreme Court will decide this fall whether to hear a challenge to the Georgia criminal statute that prohibits news media from disclosing the name of a rape victim when covering a trial. The Georgia Supreme Court found this privacy statute no violation of the First Amendment. Cox Broadcasting Corp. v. Cohn, No. 73-0938.

The last great privacy-First Amendment clash before the Supreme Court was in 1966. Then a 53-year-old Manhattan attorney named Richard M. Nixon argued that a Philadelphia family was entitled to collect damages, for an invasion of their privacy, when Life magazine published photographs of their former home along with the implication that the play "The Desperate Hours" mirrored the family's experience when held hostage by escaped convicts for 19 hours. The Court held that, in the absence of a reckless disregard of truth, the press was protected from such privacy actions. Time v. Hill, 385 U.S. 374 (1966).

The conflict continues to arise in other contexts: the Pennsylvania State Supreme Court ruled last year that The Philadelphia Inquirer was not entitled to the names, addresses and grant amounts of city welfare recipients. Thus, the newspaper's First Amendment right to gather news was limited by the welfare recipients' privacy rights. The U.S. Supreme Court let the decision stand.

Attempts to regulate telephone, door-to-door or "junk mail" solicitation have been opposed on the grounds that such solicitation, even though commercial, is a valid exercise of the First Amendment. The ACLU defends unwanted mail on this basis, even though many persons regard such mail as an invasion of their privacy.

The First Amendment provides a specific Constitutional guarantee and, to many persons, the supreme Constitutional right; and so it will usually prevail over the more general privacy right. This is especially true where the invasion of privacy is relatively slight and the threat to free press and free speech is great. That was the situation in Time v. Hill, in the eyes of six members of the Supreme Court. Further, the remedy for invasions of privacy may be damage suits after the fact, but not prior restraint of the press. However, when the issue is government disclosure of personal information so that a news organization may report the news, courts and public opinion seem to opt for preserving confidentiality and letting the newsperson, like any good reporter, get the story elsewhere.

IN CONGRESS

Bills providing broad-based privacy protections for subjects of government files have moved closer to a floor vote in each House. The Senate Government Operations Committee this month reported out S. 3418. At the suggestion of Sen. Henry M. Jackson, D.-Wash., the committee deleted a provision that would limit demands for Social Security numbers. Sen. Charles H. Percy, R.-Ill., may try to restore the provision. Committee members also amended the bill to allow government sale of mail lists if authorized by another statute. The companion bill, H.R. 16373, has been approved by a subcommittee of the House Government Operations Committee and is now before the full committee. Details are available from the Privacy Project.

IN THE STATES

A rape victim may be questioned in open court about her prior sex conduct only under limited conditions, according to a California statute passed this month (SB 1678). To protect the privacy of the victim, such questioning is now permitted only on the issue of the witness' credibility and only after the defense submits a written petition asking for a hearing on the issue and the judge approves, outside of the presence of the jury. Such testimony is now inadmissible on the issue of whether the victim consented. The lone dissenter to the bill in the California Senate said the law would deprive a defendant of a fair trial by limiting the scope of testimony. * * * The California legislature also passed SB 1845 which, like federal law, would allow parents the right to challenge the accuracy of pupil records. The measure also requires that the anecdotal part of a cumulative record be removed when a student graduates. * * * A bill to supplement federal fair credit reporting requirements, AB 4494, was passed by the Assembly, but died in Senate committee. * * * Strong opposition from the information industry effectively buried AB 2656 in a California Assembly committee, after it passed the Senate 71-0 in January. Its sponsor eliminated a section in the Senate-passed version regulating private data banks, but even that concession could not prevent its defeat. The bill codified the "fair information practices" of the U.S. Department of HEW report on databanks. Virtually every state agency affected by the bill said it would cost too much for them to comply with it. * * * The legislature sent to Gov. Ronald Reagan a bill requiring banks to give customers prior notice before granting outsiders access to bank records (AB 1609).

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